No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA

AND

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS

AND

TEXAS DEPARTMENT OF HUMAN RESOURCES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents contend that the Debt Collection Act of 1982 unambiguously abrogates the federal government's common-law right to seek prejudgment interest on debts owed by the States, but they have failed to support that position or to respond persuasively to the contrary arguments set forth in our opening brief. As we demonstrate there, the language of the Act itself does not address the continued viability of

the common-law remedy, and there is no inconsistency between that remedy and the structure or purpose of the Act. Moreover, the congressional purpose in adopting the Act militates strongly in favor of retention of the common-law rule. Those considerations in themselves suffice to require reversal of the decision below, but there is more: the agencies charged with responsibility for implementing the Act have consistently interpreted it to preserve the federal government's common-law remedy, and the presumption in favor of retaining long-established common-law rules likewise requires that result.

1. a. Respondents essentially concede, as they must, that the agencies charged with its implementation have consistently interpreted the Debt Collection Act to leave undisturbed the federal government's common-law right to seek prejudgment interest on debts owed by state and local governments. Resp. Br. 19-20. Accordingly, respondents cannot prevail unless they can demonstrate that their contrary interpretation is the *only* plausible reading of the Act. *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) (deferring to "plausible" agency interpretation of statutory term); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).[1] Respondents cannot meet that burden.

[1] Respondents appear to suggest (Br. 20) that deference to the longstanding agency interpretation of the Act is not appropriate in this case because the principle of *Chevron* deference "applies more appropriately to interpretations of policy issues and not of questions of law." Respondents cite no support for that proposition, however, nor do they explain why the question at issue in this case should be deemed a pure "question of law" despite its evident and significant policy implications. In any event, as we explain in our opening brief (U.S. Br. 22 n.8), this Court has consistently deferred to agency interpretations on matters that are no less "questions of law" than is the question presented in this case.

The text of the Debt Collection Act itself is unquestionably "silent or ambiguous with respect to the specific issue" presented in this case (*Chevron*, 467 U.S. at 843); respondents do not appear to dispute that point. Nor do respondents point to anything in the Act's legislative history that could provide the requisite "clear" or "unambiguously expressed intent of Congress" necessary to overturn the administrative construction of the statute. *Id.* at 842-843. Ultimately, then, respondents are left with nothing to support their preferred construction of the Act other than the at-best dubious inference that Congress, despite its clearly expressed goal of enhancing the federal government's ability to collect debts, chose to exempt the States from the provisions of 31 U.S.C. 3717 not merely in order to avoid imposing additional burdens on sovereign governments but also in order to abrogate the common-law prejudgment-interest remedy and thereby create an unprecedented incentive for States to delay paying their debts to the federal government.

Even if respondents' interpretation of the Act were not implausible on its face, the most that could be said for it would be that it is a possible reading of Congress's intent. Had Congress truly intended to preclude the common-law prejudgment-interest remedy in this context, it is certainly reasonable to expect that that intention would have been expressed in some form—if not in the language or structure of the statute itself, then at least in its legislative history. Given the absence of any such expression of congres-

sional intent, respondents cannot meet their burden of demonstrating that the administrative construction of the Act is unreasonable.

b. Respondents dispute the applicability in this case of the settled rule that statutes are to "be read with a presumption favoring the retention of long-established and familiar principles," and that "statutes in derogation of the common law are to be strictly construed." Resp. Br. 15 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). Even if respondents were correct in that regard, the result here would be the same, because respondents nonetheless cannot show that the longstanding administrative interpretation of the Debt Collection Act is unreasonable. In any event, respondents' attempts to rebut the presumption favoring retention of the common law are unpersuasive.

Respondents err in asserting (Br. 15) "that any deference proper in the federal courts is due state common law, not federal common law." While it is true that the presumption in favor of retaining settled common-law rules is at its strongest in the context of state common law (see *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 316-317 (1981)), this Court has applied that presumption in cases involving federal common law as well. See, *e.g.*, *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991) (federal common-law rule of preclusion); *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794, 797 (1986) (same); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. at 783 (federal maritime common law).[2] It is hardly surprising that this should be so;

[2] Respondents suggest (Br. 17) that the presumption, if applicable to federal common law at all, is applicable only in

after all, the presumption in favor of preserving federal common law is merely an application of the more general rule that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989).

Respondents also err in recasting in extreme terms our reliance on the presumption in favor of the common law. Contrary to respondents' mischaracterization (Br. 16), we do not contend that Congress must " 'affirmatively proscribe' the availability of a federal common law remedy" in order to abrogate the federal common law in a particular area. Rather, we rely on this Court's consistent admonitions that Congress will not be deemed to have supplanted federal common-law rules unless it has spoken directly to the particular question at issue or has otherwise clearly indicated its intention to abrogate the common law.[3]

the context of "substantive law that has been historically delegated to the federal courts for its full development." That contention appears to overlook this Court's application of the presumption in cases such as *Solimino* and *Elliott* and, in any event, lacks force here since federal courts have historically played a leading role in developing the substantive law of remedies (including prejudgment interest).

[3] *United States* v. *Fausto*, 484 U.S. 439 (1988), is not to the contrary. That case did not involve a statute in derogation of a well-established rule of federal common law. Instead, the question before the Court was whether a comprehensive statutory scheme governing federal personnel actions was intended to modify the preexisting judicial interpretation of another statute, the Back Pay Act. *Id.* at 453-455. Moreover, the result would have been the same in *Fausto* even if the Court had had occasion to apply the presumption in favor of long-settled common-law rules, because Congress's intent to abrogate the previous judicial construction of the Back Pay

Each of the cases relied on by respondents is consistent with this understanding of the presumption favoring retention of federal common law. Thus, in *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, *supra*, and *Isbrandtsen Co.* v. *Johnson*, *supra*, the Court found direct evidence in the structure and purpose of the particular statutes at issue that Congress clearly and affirmatively intended to abrogate the common law. See *Solimino*, 111 S. Ct. at 2171-2172 (finding clear implication that Congress intended to abrogate common-law preclusion principles because a portion of the statute would otherwise "be left essentially without effect"); *Isbrandtsen Co.*, 343 U.S. at 783 (construing statute to abrogate common-law set-off rule in light of the "obviously * * * remedial, beneficial and amendatory character" of the statute, and in order to "make effective [the statute's] design to change the general maritime law so as to improve the lot of seamen"); see also *id.* at 783-787. The language and structure of the Debt Collection Act, by contrast, shed no light on the question whether the federal government retains its common-law prejudgment-interest remedy as against the States, and Congress's express purpose in adopting the Act

Act was clear from the structure and purpose of the statute. As the Court explained, Congress had expressly intended "to replace the haphazard arrangements for administrative and judicial review of personnel action" with "an integrated scheme of administrative and judicial review." *Id.* at 444, 445. Thus, Congress's failure to provide for judicial review for a particular class of employees "display[ed] a clear congressional intent to deny" review (*id.* at 447), particularly in light of the fact that a contrary interpretation would have been directly inconsistent with two structural elements of the statute at issue. *Id.* at 449-451.

points in the direction of retaining, rather than eliminating, that remedy.

Similarly, in *City of Milwaukee* v. *Illinois*, *supra*, and *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), the Court found that Congress had expressly adopted a legal standard to govern the precise question at issue. See *City of Milwaukee*, 451 U.S. at 315, 317-324 & n.18 (concluding that Congress had "spoke[n] directly to [the] question[s]" of effluent limitations and overflows by creating a comprehensive regulatory scheme under which permits had been issued by the responsible regulatory agencies to address those precise issues); *Mobil Oil Corp.*, 436 U.S. at 623-625 (declining to adopt federal common-law rule governing the type of damages recoverable for deaths on the high seas where Congress had adopted a statute providing an answer to that question, and observing: "The Act does not address every issue of wrongful-death law, * * * *but when it does speak directly to a question*, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless") (emphasis added).[4]

In enacting the Debt Collection Act, Congress did not "speak directly" to the question of the federal government's ability to collect prejudgment interest on debts owed by state and local governments (see 436 U.S. at 625); rather, it merely declined to enhance

[4] Respondents also cite (Br. 15) *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), but that case is wholly inapposite. The presumption in favor of retaining long-settled common-law rules was not implicated in *Northwest Airlines*, because the purported common-law rule sought by the petitioner in that case did not in fact exist. See *id.* at 96-97 ("no such general federal right [to contribution] has been recognized").

that ability by subjecting the States to the provisions of Section 3717. Nor would preservation of the common-law prejudgment-interest remedy in cases involving state and local governments serve to render "meaningless" (436 U.S. at 625) or "without effect" (*Solimino*, 111 S. Ct. at 2171) Congress's decision to exempt those entities from the scope of Section 3717. As we explain in detail in our opening brief (U.S. Br. 14 n.4, 16-19), the remedy created by Section 3717 is broader than the common law in numerous respects, and thus it was eminently reasonable for Congress to decide not to impose that enhanced remedy on state and local government debtors, leaving them subject instead to the traditional and more flexible rule of the common law.[5] Thus, the presumption in favor of retaining long-established federal common-law rules compels the conclusion that the Debt Collection Act did not abrogate the federal government's right to seek prejudgment interest on debts owed by the States.

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[5] Respondents err in asserting (Br. 12, 13, 16) that preservation of the common law would subject the States to the "same" or "identical" liability as that imposed by Section 3717. The differences between Section 3717 and the common-law remedy are substantial. For example, Section 3717 *requires* federal agencies to seek prejudgment interest in most instances; the common law does not. See U.S. Br. 14 n.4. An award of prejudgment interest under Section 3717 is mandatory; the common-law remedy is left to the discretion of the courts. *Id.* at 17. Section 3717 specifies the interest rate to be applied; the common law does not. *Id.* at 17-18. Section 3717 requires the collection of penalties and processing fees from delinquent debtors; the common law does not. *Id.* at 18. Section 3717 imposes prejudgment interest on all amounts due the United States, including fines and penalties; the common law does not. *Id.* at 17-18 n.5.

c. As we explain in our opening brief (U.S. Br. 23-28), respondents' approach would create additional obstacles to the federal government's ability to collect debts, which is precisely the result that Congress sought to avoid in adopting the Debt Collection Act. Permitting States and their political subdivisions to delay payment of debts owed to the federal government at no cost to themselves would create a financial incentive for those entities to engage in such delay—an incentive that could be all the more tempting in light of the ongoing fiscal difficulties of state and local governments. Respondents' attempts to belittle this difficulty with their preferred construction of the Act are unpersuasive.

Respondents first suggest (Br. 9-10) that construing the Act to bar imposition of prejudgment interest on state and local governments would not frustrate congressional intent because "the clear focus of Congress was on private debtors, not the States." It is true that most of the Act's mechanisms for enhancing the federal government's debt-collection efforts—including the mandatory interest and penalty provisions of Section 3717—were directed against private debtors, but respondents' position draws no support from that fact. Congress clearly recognized that state and local governments owe large sums to the federal treasury (see S. Rep. No. 378, 97th Cong., 2d Sess. 2 (1982)), and there is no hint of any congressional intent to *diminish* the federal government's ability to collect debts from those entities or to *increase* the incentives for those entities to delay payment. Any interpretation of the Act that leads to those results—as respondents' assuredly does—is contrary to the language of the Act's preamble, which provides that Congress's purpose was "[t]o *increase* the efficiency

of Government-wide efforts to collect debts owed the United States and to provide *additional* procedures for the collection of debts owed the United States." 96 Stat. 1749 (emphasis added).

Respondents also assert (Br. 10-11) that imposition of interest on delinquent state debts under the Food Stamp Program would be "inequitable" because delays during the pendency of a State's administrative appeal may occur through no fault of the State. Even if respondents were correct in this regard, their conclusion—that the common-law remedy has been abrogated—would not follow, because the common law has ample flexibility to take account of and avoid true inequity. See *West Virginia* v. *United States*, 479 U.S. 305, 309, 311 n.3 (1987). In any event, respondents seriously misconceive the nature of the prejudgment-interest remedy. Prejudgment interest is not a "penalty" to be applied only where one party can be shown to be at fault for a particular delay; rather, an award of prejudgment interest is purely compensatory, and serves merely to maintain the status quo by preserving the real value of an existing debt so that neither party to the dispute benefits or suffers from a delay in payment. Imposition of prejudgment interest is in keeping with the "dictate[s] of natural justice, and the law of every civilized country," *Curtis* v. *Innerarity*, 47 U.S. (6 How.) 146, 154 (1848), and with "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947).

Indeed, it is the *failure* to impose prejudgment interest that would result in inequity here, because it would reward respondents for their unjustified delay in payment at the expense of the federal government. The Food Stamp Act and its implementing regulations impose liability on the States for excessive mail issuance losses in order to limit the federal government's costs; permitting the States to delay satisfaction of their obligations without payment of interest would upset the liability scheme mandated by Congress and the Secretary of Agriculture by allowing delinquent States to avoid reimbursing the federal fisc for the real value of their obligations. Hence, imposition of prejudgment interest on respondents' debts is clearly appropriate, because "fully repaying the Federal Government * * * will further the distribution of the burdens * * * that Congress intended." *West Virginia* v. *United States*, 479 U.S. at 310-311.

Finally, respondents assert (Br. 11) that the availability of administrative offsets against the States under some statutory schemes serves to eliminate the inconsistency between their preferred construction of the Debt Collection Act and Congress's express purpose in adopting that Act. Respondents' conclusion is a non sequitur. The fact that Congress has created specific administrative-offset schemes in certain contexts provides no support for respondents' conclusion that Congress intended to abrogate the common-law prejudgment-interest remedy in *all* contexts, and did so silently as part of a statute intended solely to *enhance* the federal government's ability to collect its debts.[6]

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[6] Similarly, the fact that Congress has mandated the imposition of prejudgment interest on debts owed by the States

2. Respondents halfheartedly assert (Resp. Br. 21-22) that an award of prejudgment interest in this case is inappropriate under the common law because, in their view, their obligation to reimburse the federal government for mail issuance losses is a non-interest-bearing "penalty" rather than a contractual debt. In making that assertion, however, respondents ignore the undisputed fact—discussed in detail in our opening brief (see U.S. Br. 3-4, 31-32)—that the federal regulation requiring respondents to assume liability for mail issuance losses was expressly incorporated as a term of the contract between respondents and the United States.

Respondents do not and cannot deny (1) that their participation in the federal Food Stamp Program is governed by the Federal/State Agreement, 7 C.F.R. 272.2(a)(2); (2) that pursuant to that Agreement they have contractually agreed to be bound by the Food Stamp Act and all Food Stamp Program regulations as well as "any changes in Federal law and regulations," 7 C.F.R. 272.2(b)(1); and (3) that their obligation to reimburse the federal government for the mail issuance losses involved in this case arises from a Food Stamp Program regulation, 7 C.F.R. 274.3 (1986). Thus, there is no basis for respondents' assertion that their underlying obliga-

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in certain contexts provides no support for respondents' conclusion that Congress intended the Debt Collection Act to abrogate the common-law prejudgment-interest remedy generally. Respondents invoke specific interest provisions of the Medicaid Act, 42 U.S.C. 1396b(d)(5), and the Social Security Act, 42 U.S.C. 418(j) (1982) (see Resp. Br. 13), but both of those provisions were enacted *prior* to the adoption of the Debt Collection Act (see Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, Tit. IX, § 961(a), 94 Stat. 2650, codified as amended at 42 U.S.C. 1396b(d)(5); Social Security Act Amendments of 1950, ch. 809, sec. 106, § 218(j), 64 Stat. 517, codified as amended at 42 U.S.C. 418(j) (1982), repealed, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Tit. IX, § 9002(c), 100 Stat. 1971), and thus can hardly be read to support the proposition that Congress intentionally abrogated a common-law remedy that unquestionably existed both before and after their adoption. Moreover, those provisions merely codified and made mandatory the collection of prejudgment interest at a specified rate in certain limited circumstances, thus strengthening the government's remedies beyond those provided at common law. Those provisions are certainly not evidence of any legislative intention that, in their absence, there would be *no* interest available.

Respondents also err in relying (Br. 13) on Pub. L. No. 100-435, § 602, 102 Stat. 1674 (1988), which amended 7 U.S.C. 2022 to provide for prejudgment interest on obligations arising under the Food Stamp Act's quality-control program. "[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (citations omitted); see also *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980). That is particularly true in this case, where the 1988 Congress that adopted the amendment had considerable reason to believe that, whatever Congress's actual intentions with respect to preservation of the common law, the lower courts would not look favorably on attempts by the federal government to exercise its common-law prejudgment-interest remedies. See, *e.g.*, *Perales* v. *United States*, 751 F.2d 95 (2d Cir. 1984); *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334, 341-342 (3d Cir. 1986); *Arkansas* v. *Block*, 825 F.2d 1254, 1258 (8th Cir. 1987). Moreover, Congress's adoption of amended Section 2022 did not, as respondents would have it (Br. 13), constitute a "redundant codification of common law"; instead, it replaced the discretionary common-law remedy with a *mandatory* provision requiring prejudgment interest at a specified rate in certain circumstances and not in others.

tion to the United States is not "a debt created by a contractual arrangement." Resp. Br. 21.

Respondents suggest (Br. 21) that their obligation to reimburse the federal government for mail issuance losses was imposed unilaterally and arbitrarily by the Secretary of Agriculture without negotiation and over their objection,[7] and that this somehow ne-

[7] Respondents' objections in this regard are considerably exaggerated. There was certainly nothing "arbitrary" about the tolerance level selected by the Secretary of Agriculture. That regulatory limit was adopted only after exhaustive and meticulous consideration of the matter in public rulemaking proceedings conducted in accordance with the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. 553. The tolerance level was based upon an examination of historical mail loss data which suggested that a mail loss limit of 0.5% would be a "realistically attainable goal." 47 Fed. Reg. 50,682 (1982). Challenges to the validity of the mail loss tolerance level have been unanimously rejected by the courts, see *Arkansas* v. *Block*, 825 F.2d 1254, 1256-1257 (8th Cir. 1987); *Gallegos* v. *Lyng*, 891 F.2d 788, 792 (10th Cir. 1989), and respondents expressly declined to challenge the tolerance level below. Pet. App. 16a. Having deliberately abandoned any contention that the mail loss tolerance level was set arbitrarily by the Secretary, respondents should not be permitted to resurrect that contention here.

Respondents also err in suggesting (Br. 21) that the imposition of liability on the States for mail issuance losses is not subject to judicial review. Although the Secretary's decision whether to waive a State's liability is not itself judicially reviewable because it is committed to agency discretion by law (see 5 U.S.C. 701(a)(2); Pet. App. 5a-7a), respondents point to nothing that would preclude judicial review of a misapplication of the regulatory loss tolerance level. The analogy to a traditional commercial contract is precise: courts do not typically review the propriety of one party's discretionary decision to waive the other party's contractual obligations; rather, judicial review is available only to enforce the contract according to its terms.

gates the contractual nature of that obligation. In fact, however, virtually all of the terms of the Food Stamp Program, and for that matter most other federal-state cooperative grant programs as well, are "unilaterally" imposed by Congress or the responsible federal agency in the form of statutes and regulations, and the States must either agree to abide by those terms or decline to participate in the program. See *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 11 (1981). The federal government's exercise of its prerogative to specify the terms on which its money will be spent does not eliminate the contractual nature of the obligations imposed on States that choose to participate in federal grant programs; rather, it *defines* the terms of the contract between the federal government and each participating State. See, *e.g.*, *id.* at 17.

Respondents also contend (Br. 21) that their liability for mail issuance losses is "punitive" in nature. As we explain in our opening brief (U.S. Br. 3-4, 33-34), however, there is nothing "punitive" about requiring a State to compensate the federal government for a fraction of the financial losses caused by the State's decision to distribute food stamp coupons through the mails; the federal government is simply asking the States to shoulder responsibility for a portion of the costs of operating the Food Stamp Program, costs that would otherwise be borne exclusively by the United States. Respondents do not take issue with the fact that the federal government incurs direct financial losses when food stamp coupons are stolen in the mails and then redeemed by persons other than the intended recipients, and thus it is im-

possible to discern any basis for respondents' assertion that their liability for excessive mail issuance losses is "punitive" rather than compensatory in nature.

3. a. Respondents renew their contention (Resp. Br. 22-24) that imposition of prejudgment interest in this case is barred by *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981). According to respondents, they did not "voluntarily and knowingly accept[]" (Resp. Br. 23) the obligation to pay interest, because the Food Stamp Act itself does not itself include such a requirement.

As we point out in our opening brief (U.S. Br. 29-30), at all times relevant to this case, federal law expressly and unambiguously provided that federal agencies retained the right to seek prejudgment interest under the common law on debts owed by state and local governments. See 4 C.F.R. 102.13(i); 49 Fed. Reg. 8894, 8901 (1984). Respondents do not and cannot dispute that fact. Moreover, the notices mailed to respondents informing them of the amount of their liability for mail issuance losses expressly stated that, pursuant to federal law, prejudgment interest would begin to accrue if respondents failed to pay their obligations within 30 days. J.A. 7, 10. Thus, respondents were clearly on notice, well before they incurred the debts and interest obligations at issue in this case, that they could be liable for mail issuance losses and prejudgment interest thereon if they chose to continue their policy of mail issuances and if they failed to pay their obligations in a timely manner. Respondents' attempt to deny the voluntary and knowing nature of their obligations is entirely without foundation.

This Court's decision in *West Virginia* v. *United States*, *supra*, further demonstrates the insubstantial-

ity of respondents' contentions in this regard. In that case, as here, the State argued that imposition of prejudgment interest under the common law would violate *Pennhurst*, because the statute giving rise to the underlying debt was silent as to the availability of prejudgment interest. See 85-937 Pet. Br. at 21-23.[8] The United States argued in reply that the State "had reason to anticipate its liability for interest: interest is an expected part of a debt liability, rather than an unanticipated term attached to receipt of funds." 85-937 U.S. Br. at 20 n.8. The Court's opinion in *West Virginia* did not discuss the *Pennhurst* issue, but in upholding the imposition of prejudgment interest on the State under the common law the Court implicitly rejected the State's reliance on *Pennhurst*. See, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738, 747-748 n.3 (1990). The same result is equally appropriate here.[9]

b. Respondents also assert (Br. 24) that imposition of prejudgment interest is inappropriate under

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[8] Indeed, the petitioner in *West Virginia* relied in part on two court of appeals cases applying *Pennhurst* to bar an award of prejudgment interest in precisely the circumstances of this case. See 85-937 Pet. Br. at 23 (citing *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334, 342 nn. 12 & 13 (3d Cir. 1986); *Perales* v. *United States*, 751 F.2d 95 (2d Cir.), aff'g 598 F. Supp. 19, 24-26 (S.D.N.Y. 1984)).

[9] Respondents assert (Br. 23) that *West Virginia* is inapposite, because the contract at issue in that case was not covered by the Debt Collection Act. That fact is beside the point for purposes of respondents' *Pennhurst* defense, however; both before and after enactment of the Debt Collection Act, a State could contend that imposition of prejudgment interest under the common law would violate *Pennhurst* in the absence of an express provision for that remedy, but this Court in *West Virginia* necessarily, albeit implicitly, rejected that contention.

Pennhurst because respondents' "violation" of the Food Stamp Act was "unintentional," in that the mail issuance losses resulted from the actions of third parties over whom respondents had no control.[10] That assertion is incorrect.

In the first place, respondents did not "violat[e]" federal law by incurring mail issuance losses in excess of the loss tolerance limits. To the contrary, they were legally and contractually *entitled* to issue food stamp coupons by mail, and mail issuance losses were an inevitable and anticipated result of respondents' decision to utilize that issuance system. Thus, this case involves merely the allocation of foreseeable financial losses pursuant to the terms of a federal/state contract, not the imposition of liability for a violation of federal law. Accordingly, the rule cited by respondents has no application here.

In any event, respondents *did* intentionally incur the liability at issue in this case, *i.e.*, the obligation to pay prejudgment interest on their underlying debt for

[10] Respondents assert (Br. 24) that the mail issuance losses involved in this case were solely the result of theft by employees of the United States Postal Service, and imply (Br. 3) that respondents' liability for those losses should therefore have been excused. In fact, however, the record in this case does not reveal the proportion of total mail issuance losses that was due to theft by Postal Service employees, and it is at least open to question whether those thefts exceeded the approximately $700,000 of total mail issuance losses that the federal government did *not* pass on to respondents. See U.S. Br. 4-5 n.3. In any event, there is no basis for respondents' implication that they should not have been held liable for the mail issuance losses suffered as a result of theft by Postal Service employees. Respondents' claim to that effect was correctly rejected below (Pet. App. 25a-26a), and they did not file a cross-petition for certiorari seeking to challenge that ruling.

mail issuance losses.[11] Respondents were on both actual and constructive notice that prejudgment interest would be sought if they failed to pay their obligations within 30 days. J.A. 7, 8, 10, 11; 4 C.F.R. 102.13(i). They nonetheless chose to pursue an administrative appeal and judicial review, thereby knowingly incurring liability for the prejudgment interest necessary to compensate the federal government for the delay in payment engendered by respondents' appeals. Accordingly, respondents' reliance on the *Pennhurst* doctrine is misplaced, because this is not a case in which "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." Resp. Br. 24 (quoting *Franklin* v. *Gwinnett County Pub. Schools*, 112 S. Ct. 1028, 1037 (1992)).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Acting Solicitor General

FEBRUARY 1993

[11] For that matter, respondents also intentionally incurred their liability for mail issuance losses. The terms of the contract between respondents and the United States unambiguously provided that respondents would be liable for all mail issuance losses in excess of the loss tolerance level if they chose to issue food stamp coupons by mail. Respondents nonetheless chose to utilize the mail issuance system, and thus they must be deemed to have intentionally incurred the resulting losses, which were clearly foreseeable.

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